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# In the Supreme Court of the United States

ESTHER KIOBEL, *et al.*,

*Petitioners,*

—v.—

ROYAL DUTCH PETROLEUM CO., *et al.*,

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

## SUPPLEMENTAL BRIEF OF *AMICI CURIAE* GERMAN INSTITUTE FOR HUMAN RIGHTS AND INTERNATIONAL LAW EXPERTS IN SUPPORT OF PETITIONERS

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... iv

STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE* ..... 1

SUMMARY OF ARGUMENT ..... 2

ARGUMENT ..... 4

I. INTERNATIONAL LAW ALLOWS U.S. COURTS TO RECOGNIZE A CAUSE OF ACTION FOR VIOLATIONS OF THE LAW OF NATIONS OCCURRING WITHIN THE TERRITORY OF A SOVEREIGN OTHER THAN THE UNITED STATES WHEN A GENERALLY RECOGNIZED BASIS OF JURISDICTION EXISTS ..... 4

A. A. Permissible Bases of Jurisdiction Under International Law Include Territory (Which in Civil Matters Can Also Encompass Presence, Domicile, Business Activity or Assets), Nationality, the Protection Of Other State Interests, and the Protection of Certain Universal Interests ..... 5

B. In Exercising Universal Jurisdiction, National Courts Act on Behalf of the International Community of Sovereign

States and thus an Infringement on the Sovereign Rights of Other States Is Unlikely ..... 13

C. Under The Principle Of Universal Jurisdiction, the Extraterritorial Exercise of Adjudicative Jurisdiction Is Permissible in Situations Involving Gross Violations of Well-Defined and Universally Recognized Human Rights Norms ..... 15

D. The ATS Can Be Interpreted in Light of the Principle Of Universal Jurisdiction Regardless of Its Civil Law Nature ..... 18

II. THE PRUDENTIAL DOCTRINE OF INTERNATIONAL COMITY DOES NOT PRECLUDE THE EXERCISE OF JURISDICTION BASED UPON THE ATS ..... 21

A. The Nature of International Comity ..... 21

B. Regardless of the Test Employed by This Court, ATS Claims Will Rarely Merit Dismissal Based Upon Concerns of International Comity ..... 24

C. Even Where Concerns Over International Comity Suggest

Deference to Foreign Nation, Consideration of American Public Policy Will Likely Necessitate the Retention of Jurisdiction Over an ATS Claim ..... 28

III. ANY REQUIREMENT UNDER INTERNATIONAL LAW TO EXHAUST LOCAL REMEDIES DOES NOT CATEGORICALLY PRECLUDE A CLAIM UNDER THE ATS ..... 30

A. The Exhaustion Rule Applies to Diplomatic Protection under International Law ..... 31

B. The Exhaustion Rule Is a Procedural Requirement for Individual Claims before International Human Rights Bodies, but Not a Procedural Requirement for ATS Claims Before a Domestic Court ... 32

C. The Scope of the Rule is Limited to Local Remedies ..... 36

D. Exceptions To The Exhaustion Rule Exist ..... 38

CONCLUSION ..... 42

APPENDIX - LIST OF *AMICI CURIAE* GERMAN INTERNATIONAL LAW SCHOLARS ..... A-1

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*Bigio v. Coca-Cola Co.*,
448 F.3d 176 (2d Cir. 2006) . . . . . 23, 24

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*Demjanjuk v. Petrovsky*,
776 F.2d 571 (6th Cir. 1985) 8 n.4, 16 n.11

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542 U.S. 155 (2004) . . . . . 22

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456 F.3d 363 (3d Cir. 2006) . . . . . 24

*Hartford Fire Insur. v. California*,
509 U.S. 764 (1993) . . . . . 23, 26

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159 U.S. 113 (1895) . . . . . 23

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25 F.3d 1467 (9th Cir. 1994) . . . . . 17

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93 F.3d 1036 (2d Cir. 1996) . . . . . 24

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347 F.3d 589 (5th Cir. 2003) ..... 23

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504 F.3d 254 (2d Cir. 2007) ..... 22, 29

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No. 10-1491 (U.S. Feb. 2, 2012) ..... 27

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731 F.2d 909 (D.C. Cir. 1984) ..... 29

*Mushikiwabo v. Barayagwiza*,
No. 94 Civ. 3627, U.S. Dist. LEXIS 4409
(S.D.N.Y. 1996) ..... 40

*Pravin Banker Associates, Ltd. v. Banco Popular Del Peru*,
109 F.3d 850 (2d Cir. 1997) ..... 29, 30

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830 F.2d 1260 (3d Cir. 1987) ..... 23

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487 F.3d 1193 (9th Cir. 2007) ..... 24

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482 U.S. 522 (1987) ..... 22

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542 U.S. 692 (2004) . . . . . passim

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726 F.2d 774 (D.C. Cir. 1984) . . . . . 25

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379 F.3d 1227 (11th Cir. 2004) . . . . . 24, 27

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July 2, 1991, Neue Juristische Wochenschrift [NJW] 3092 (F.R.G.) . . . . 11

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Nov. 28, 2011, 21 U 23/11 (Frankfurt) (F.R.G.) . . . . . 11 n.7

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Nov. 7, 2002,. 6 Ob 174/02k (Austria) . . . 12

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Nov. 25, 1999, 8 Ob 105/99w (Austria) . . 12

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Dec. 12, 2000, 2 BvR 1290/99
(F.R.G.) ..... 16 n.11

International Cases

*Akdivar v. Turkey*,
23 Eur. Ct. H.R. 143 (1996) ..... 37

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12 R. Int'l Arb. Awards 83 (1956) ... 34, 37

*Arrest Warrant of 11 April 2000*
(Dem. Rep. Congo v. Belg.),
2002 I.C.J. 3 (Feb. 14) ..... 8, 9

*Att'y Gen. v. Eichmann*,
36 I.L.R 277
(Isr. Sup. Ct. 1962) ..... 8 n.4, 16 n.11

*Barcelona Traction, Light and Power Co.*
(Belg. v. Sp.), 1970 I.C.J. 3 (Feb. 5) ..... 17

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(Fr. v. Nor.), 1957 I.C.J. 9 ..... 39

*Davydov v. Ukraine*, Judgment
(Eur. Ct. H.R. July 1, 2010) ..... 37

*Elettronica Sicula SpA (ELSI)* (U.S. v. Italy),
1989 I.C.J. 15 (July 20) ..... 35, 39

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1927 P.C.I.J. (ser. A) No. 9 (July 26) .... 35

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1959 I.C.J. 6 (Mar. 21) . . . . . 31, 35, 37

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1924 P.C.I.J. (ser. A)
No. 2, at 12 (Aug. 30). . . . . 32 n.20

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(F.R.G. v. Den.; F.R.G. v. Neth.),
1969 I.C.J. 3 (Feb. 20) . . . . . 21

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Case No. IT-95-17/1-T, Judgment,
(Dec. 10, 1998) . . . . . 16 n.10

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Case No. ICTR-90-40-T, Decision on the Prosecutor's Motion to Withdraw the Indictment (Mar. 18, 1999) . . . . . 16 n.11

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Case No. IT-94-1-AR72,
Judgment (Oct. 2, 1995) . . . . . 16 n.11

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(U.S. v. U.K.), 6 R. Int'l Arb. Awards 120
(Gr. Brit.-U.S. Arb. Trib. 1923) . . . . . 40

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1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) . 5 n.2

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(U.S. v. Egypt) 2 R. Int'l Arb. Awards 1161
(U.S.-Egypt Special Claims
Tribunal 1932) ..... 32

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(U.S. v. U.K.), Decision and Award
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7 ICSID (W. Bank) 442 (2003) ..... 39

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Reichsgesetzblatt [RGBl]
No. 1895/111, art. 99 (Austria) ..... 12

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Pub. L. 102-256, 106, Stat. 73 (1991) . 30, 36

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Jan. 30, 1877, § 23 (F.R.G.) ..... 10, 11, 12

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Nov. 22, 1969, 1144 U.N.T.S. 123 .. 34 n.21

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## STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The **German Institute for Human Rights** (*Deutsches Institut für Menschenrechte*, DIMR) is Germany's accredited independent nonprofit National Human Rights Institution in compliance with the U.N. Paris Principles. The Institute's function is to contribute to the promotion and protection of human rights in Germany and internationally. Since its founding in 2001, the Institute plays an active role in shaping German politics and public opinion on all human rights issues as well as on the UN and European level. The Institute gives research-based policy advice on integrating human rights into domestic and international policies. Furthermore, it monitors the human rights-sensitive activities of the German Government outside the country. The Institute has the power and responsibility to submit to any competent body, on an advisory basis, legal opinions on any matters concerning the promotion and protection of human rights. In particular, it has an interest in the present case because the German Government, in its *amicus curiae* brief in support of respondents, erred in the relationship between state sovereignty and the state duty to protect human rights.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel contributed money to the preparation or submission of this brief. Both parties have given blanket consent for filing *amicus* briefs.

*Amici* are also **international law experts** and scholars from leading German institutions of higher learning and formally independent and nonprofit research institutes with global reputations in the field. They have extensive knowledge and experience in international law, human rights law, and comparative law. In addition to researching and teaching these subjects, they regularly advise governments, organizations, and others on international legal issues. As legal scholars working in Germany, they consider it their responsibility to respectfully submit this brief in order to assist the Court in coming to an understanding that better reflects the opinions of German legal scholars on the important issues raised in this case. Short summaries of their biographies are appended in the Appendix to this brief.

## SUMMARY OF ARGUMENT

International law is not opposed to the Alien Tort Statute (ATS), 28 U.S.C. §1350, which allows U.S. courts to hear lawsuits for certain violations of international law on foreign soil.

First, international law permits U.S. courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the U.S. as long as a generally recognized basis of jurisdiction exists. Accepted and frequently applied bases of jurisdiction in both civil and criminal matters include territory, nationality, the protection of other state interests, and the protection of certain universal interests (i.e. universal

jurisdiction).

Under the principle of universal jurisdiction, the extraterritorial exercise of adjudicative jurisdiction is permissible in situations involving gross violations of universally recognized human rights norms. This is compatible with the Court's own requirements for actionable norms under the ATS as laid down in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). It is compelled by the fact that international law in general relies heavily on domestic implementation. Universal jurisdiction can be exercised through criminal and civil law. In practice, the principle of universal jurisdiction is often applied in combination with other recognized bases of jurisdiction. In such situations, the range of actionable norms is not limited to gross violations of universally recognized human rights norms.

Irrespective of the principle of universal jurisdiction, various national legal systems have jurisdiction legislation encompassing extraterritorial elements in civil disputes. International law jurisdiction principles are drawn from these. A broad understanding of the territoriality principle that affords jurisdiction not only based on the location where a harmful event occurred, but also according to the place of the respondent's assets or business activity is for instance not unknown to German and Austrian civil procedure.

Second, the prudential doctrine of international comity does not preclude the exercise of jurisdiction

based upon the ATS. From the perspective of international law, the comity of nations is neither a source of law nor legally binding. It cannot give rise to state liability. Moreover, given that the ATS aims at enforcing a limited number of the most important and universally recognized norms of international law, there is a general presumption according to which its application will not jar with the interests of other states. But even where concerns regarding international comity might suggest deference to a foreign nation, consideration of American public policy will likely necessitate the retention of jurisdiction over a §1350 claim.

Third, any requirement under international law to exhaust local remedies does not categorically preclude a claim under the ATS. The exhaustion rule in international law is only applicable in the field of diplomatic protection and regarding individual complaint procedures under international human rights institutions, such as UN human rights treaty bodies. It is not a legal requirement coordinating the exercise of civil jurisdiction in the international arena. Further or alternatively, there are well-established exceptions to the exhaustion rule.

## ARGUMENT

### I. INTERNATIONAL LAW ALLOWS U.S. COURTS TO RECOGNIZE A CAUSE OF ACTION FOR VIOLATIONS OF THE

## LAW OF NATIONS OCCURRING WITHIN THE TERRITORY OF A SOVEREIGN OTHER THAN THE UNITED STATES WHEN A GENERALLY RECOGNIZED BASIS OF JURISDICTION EXISTS

### A. Permissible Bases of Jurisdiction Under International Law Include Territory (Which in Civil Matters Can Also Encompass Presence, Domicile, Business Activity or Assets), Nationality, the Protection Of Other State Interests, and the Protection of Certain Universal Interests

In international legal practice, the exercise of domestic jurisdiction over conduct or incidents occurring within the territory of another sovereign requires a recognized basis of jurisdiction. Even if not strictly required by the International Court of Justice or its predecessor,[2] this helps to avoid

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[2]The Permanent Court of International Justice famously held that international law leaves room for extraterritorial jurisdiction.

> Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited

potential conflicts with foreign jurisdictions. Besides a territorial connection, other generally accepted and frequently applied bases of jurisdiction in both civil and criminal matters are: nationality, the protection of other state interests, and the protection of certain universal interests. *See* Antonio Cassese, *International Law* 50 (2d ed. 2005); Malcolm M. Shaw, *International Law* 651-73 (6th ed. 2008).

This does not imply that a court's adjudication of claims beyond these bases is necessarily unlawful. It is, however, more likely to intervene unduly in the internal affairs of another state. Jurisdictional competence under international law thus is a relational concept, which in a community of sovereign nation states has to be applied with the principle of non-intervention as its ultimate legal limitation.[3]

There are two noteworthy aspects of the doctrine of jurisdictional competence in this context. First, jurisdictional competence is not based on a principle

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in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.

*S.S. "Lotus"* (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7). This has not been reversed by the International Court of Justice.

[3] Specific treaty rules limiting jurisdiction may of course apply. *See generally* Ian Brownlie, *Principles of Public International Law* 299, 312 (7th ed. 2008) (discussing the principle of non-intervention as an outer limit to jurisdictional competence).

of exclusiveness. As Professor Brownlie makes clear, "the same acts may be within the lawful ambit of one or more jurisdictions." Ian Brownlie, *Principles of Public International Law* 312 (7th ed. 2008). Secondly, the various bases of jurisdiction often interweave in practice and are used in combination with one another. *Id.* at 308. A lesser link to the territory of a state in a particular case can be complemented, for instance, by an indirect link to nationals of that state in order to justify jurisdiction cumulatively. Alternatively, the protection of universal interests as a basis of criminal jurisdiction could complement a less substantial connection to the territory of a state (e.g. physical presence or economic activity in the country).

From the perspective of international law, U.S. courts are thus free to recognize claims brought under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, for violations of the law of nations if *at least* one of these generally recognized bases for jurisdiction exists: territory, nationality, the protection of other state interests, or the protection of certain universal interests.

Given that the ATS concerns the original jurisdiction of U.S. courts, the more restrictive international legal regime concerning extraterritorial enforcement (as opposed to adjudication) does not apply. Hence, even in cases in which no substantial connection to the territory or nationals of the United States can be identified, U.S. courts may exercise

adjudicative jurisdiction for the protection of specific universal interests, such as combating piracy, slavery, and gross violations of certain human rights norms, namely torture, genocide, crimes against humanity, and specific war crimes. *See* Shaw, *supra*, at 668-671; Magdalena Kmak, *The Scope and Application of the Principle of Universal Jurisdiction* 93 (2011). Indeed, the law of nations relies primarily on decentralized (i.e. domestic) implementation of international norms, especially regarding the provision of civil remedies.

In practice, the principle of universal jurisdiction is often applied in combination with other recognized bases of jurisdiction.[4] Yet, the infrequent exercise of pure universal jurisdiction does not imply that such an exercise would be unlawful. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 2002 I.C.J. 3, ¶ 45 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal). To the contrary, states' consistent practice in this field is a testament to the general acceptance of universal jurisdiction. As Judges Higgins, Kooijmans, and Buergenthal point out, "There are, moreover, certain indications

[4]Such scenarios might include nationals as victims, defendants as economic actors within the territory of the state assuming jurisdiction, or defendants with a temporary physical presence within the state's territory. *See, e.g., Att'y Gen. v. Eichmann*, 36 I.L.R 277, 303-04 (Isr. Sup. Ct. 1962); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582-583 (6th Cir. 1985), *cert denied*, 475 U.S. 1016 (1986).

that a universal criminal jurisdiction for certain international crimes is clearly not regarded unlawful." *Id.* ¶ 46. This applies *a fortiori* to civil jurisdiction.

It needs to be emphasized that there is no doubt as to the legality of the exercise of universal jurisdiction once additional connections to the country assuming jurisdictional competence can be identified. With respect to the factual links required under other bases of jurisdiction such as territory, nationality, or national interests, contemporary trends show a lowering of thresholds in the form of the "effects," "impact," and "doing business" doctrines. *See id.* ¶ 47 (discussing general developments); Menno T. Kamminga, *Extraterritoriality*, *in Max Planck Encyclopedia of Public International Law* ¶ 27 (Rüdiger Wolfrum ed., 2012) (recognizing that "the exercise of extraterritorial jurisdiction by way of prescription and adjudication is on the rise"); Michael Rosenthal & Stefan Thomas, *European Merger Control* 11-12 (2010) (discussing effects doctrine).

Particularly in civil matters, states often assert judicial jurisdiction on broad grounds that look beyond the location where an act or event took place. *See* Michael Akehurst, *Jurisdiction in International Law*, 46 Brit. Y.B. Int'l. L. 145, 170-177 (1974). Various national legal systems have legislation with extraterritorial effect. This is relevant because the principles of jurisdiction under international law rest

on a generalized amalgam of national provisions. *See* Brownlie, *supra*, at 308. A wide understanding of the territoriality principle is for instance not unknown to German civil procedure. Section 23 of the German Code of Civil Procedure was enacted in 1877 in order to facilitate civil claims, including actions for damages under tort law against respondents neither domiciled in Germany nor having statutory or administrative seat or branch offices within German territory. Zivilprozessordung [ZPO][Code of Civil Procedure], Jan. 30, 1877, § 23 (F.R.G.).[5] Section 23 of the ZPO does not stipulate requirements as to the cause of action, the location where an act or event occurred, or the nationality or domicile of the plaintiff or respondent. All that is required for German courts to exercise jurisdiction under this provision is that an asset of the respondent is located in Germany and that the dispute has a "further

[5] The translation endorsed by the German Federal Ministry of Justice reads:

> For complaints under property law brought against a person who has no place of residence in Germany, that court shall be competent in the jurisdiction of which assets belonging to that person are located, or in the jurisdiction of which the object being laid claim to under the action is located. Where claims are concerned, the debtor's place of residence and, in cases in which an object is liable for the claims as collateral, the place at which the object is located shall be deemed to be the location at which the assets are located.

domestic connection" to Germany.[1] In 1991, the German Federal Court of Justice held that this was in accordance with the general principle of non-intervention derived from international law. Bundesgerichtshof [BGH] [Federal Court of Justice] July 2, 1991, Neue Juristische Wochenschrift [NJW] 3092. At the time, the Federal Court did not discuss in detail the nature of the required link to Germany. Legal scholars interpreting the 1991 decision have argued that a sufficient "domestic connection" exists, for example, when the defendant is doing business in Germany. *See* Jürgen Mark & Hans-Jörg Ziegenhain, *Der Gerichtsstand des Vermögens im Spannungsfeld zwischen Völkerrecht und deutschem internationalen Prozessrecht*, 1992 NJW 3062, 3064-3065. The Federal Court previously had ruled that Section 23 of the ZPO is applicable when the respondent operates a branch on German territory, as this would imply that sufficient assets were present. *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 12, 1990, Neue Juristische Wochenschrift [NJW] 423.[7]

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[1] *Cf.* Rudolf Waizenegger, *Der Gerichtsstand des § 23 ZPO und seine geschichtliche Entwicklung* (1915).

[7] A later decision of the Higher Regional Court of Frankfurt/Main considered the domestic connection requirement to be satisfied where a defendant simply had assets in Germany and was being sued by a plaintiff domiciled in Germany. Oberlandesgericht [OLG] Nov. 28, 2011, 21 U 23/11 (Frankfurt). The case is currently pending at the Federal Court of Justice. BGH, III ZR 282/11. Legal scholars have rightly pointed out that the "further domestic

Several other European states furnish their courts with jurisdiction that is not limited to acts or events occurring within their territory. Article 99 of the Austrian Court Jurisdiction Act, for instance, includes another example of asset-based jurisdiction. Jurisdiktionsnorm [JN] [Courts Jurisdiction Act],Reichsgesetzblatt [RGBl] No. 1895/111. Along the lines of Section 23 of the German ZPO, Article 99 provides for the jurisdiction of Austrian courts when assets (or a branch) belonging to the respondent are located in Austria. Austrian courts state that this provision does not require any further connection between Austria and either the plaintiff or the respondent. *See* Oberster GerichtshofOberster Gerichtshof [OGH] [Supreme Court] Nov. 7, 2002,. 6 Ob 174/02k. In explaining its interpretation of Article 99, the Austrian Supreme Court refers to Article 27a(2) of the same Act, which states that Austrian jurisdiction shall be provided as long as there is no conflict with international law. The Austrian Supreme Court does not consider, for example, international law to prohibit such an exercise of adjudicative jurisdiction whenever a branch is located in Austria. *See* Oberster Gerichtshof [OGH] [Supreme Court] Nov. 25, 1999, 8 Ob 105/99w .

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connection" can be fulfilled by, but does not necessarily require, a German domicile, since this would deprive Section 23 of the ZPO of its relevance and would contradict the will of the legislature. *See* Herbert Roth, *§ 23* at ¶ 12, *in Kommentar zur Zivilprozessordnung* (F. Stein & M. Jonas eds., 22d ed. 2004).

In conclusion, domestic courts are free to recognize claims for violations of international law if at least one generally accepted basis for jurisdiction exists.

### B. In Exercising Universal Jurisdiction, National Courts Act on Behalf of the International Community of Sovereign States and thus an Infringement on the Sovereign Rights of Other States Is Unlikely

The principle of universal jurisdiction evolved as a specific basis of jurisdiction in order to enable states to define and punish the violation of rules of universal concern, such as the prohibitions on piracy and the slave trade. *See Sosa*, 542 U.S. at 715-720, 723-725; 4 William Blackstone, Commentaries *68; Restatement (Third) of Foreign Relations Law of the United States § 404 (1987). This had taken shape as a general principle of international law before the ATS was passed by Congress. As to the evolution of this principle in customary international law, two main motives have been identified as the reason why the community of sovereign states would allow this particular form of extraterritorial jurisdiction: (i) in order to punish offenses like piracy, which are often perpetrated on the high seas and thus outside of domestic jurisdictional reach, and (ii) to allow for the national prosecution and punishment of particularly

heinous and repugnant violations of the law of nations, such as the slave trade, even if this is undertaken in a location beyond the jurisdictional reach of states.[8] It was precisely the prohibition of the slave trade in the nineteenth century that introduced a new dynamic element into the ambit of norms covered by the principle of universal jurisdiction: international legal norms that protect human dignity as the cornerstone of human rights.

Conceptually, the exercise of jurisdiction based on the principle of universal jurisdiction must be differentiated from the other generally accepted bases for jurisdiction regarding an incident or conduct occurring on foreign soil. Its central rationale is to put into effect a limited number of elementary rules of the law of nations through domestic prescription, adjudication, and enforcement. In doing so, domestic institutions seek to uphold shared interests of the community of sovereign states,[9] recognizing that it is in the interest of each individual sovereign nation that the most egregious violations of international law are addressed effectively.

[8] *See* Ilias Bantekas, *Criminal Jurisdiction of States under International Law, in Max Planck Encyclopedia of Public International Law* ¶ 23 (Rüdiger Wolfrum ed., 2012).

[9] *Cf.* Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 Recueil des Cours, 217 (1994); Andreas Paulus, *Die internationale Gemeinschaft im Völkerrecht* (2001) (discussing the notion of international community in international law).

Consequently, universal jurisdiction by its very nature is a basis for jurisdiction that is less concerned with the question of whether or not other sovereigns might have a specific or more justified national interest in exercising jurisdiction. Every state can impose liability for any of these violations of universal concern at any time, unless the perpetrators have already been adequately punished (*ne bis in idem*), have already adequately compensated the victims, or are currently facing possible judicial sanction in another court. *See* Brownlie, *supra*, at 308. In contrast to the other bases of jurisdiction, the principle of universal jurisdiction, if applied as the only basis of jurisdiction, allows U.S. courts to recognize a cause of action for the protection of certain universal interests, embodied in a limited number of norms under the law of nations.

### C. Under The Principle Of Universal Jurisdiction, the Extraterritorial Exercise of Adjudicative Jurisdiction Is Permissible in Situations Involving Gross Violations of Well-Defined and Universally Recognized Human Rights Norms

Universal jurisdiction does not apply to all norms forming part of customary international law. Besides piracy and slavery, universal jurisdiction in state

practice is exercised over torture,[10] genocide,[11] war crimes,[12] and crimes against humanity.[13] Since the

[10] Universal jurisdiction over acts of torture is permitted under customary international law. *See Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 156 (Dec. 10, 1998). Universal jurisdiction is compulsory under Article 5(2) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/39/51 (1984).

[11] Universal jurisdiction over acts of genocide is recognized by customary international law. *See Prosecutor v. Ntuyahaga*, Case No. ICTR-90-40-T, Decision on the Prosecutor's Motion to Withdraw the Indictment (Mar. 18, 1999); *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Judgment, ¶ 62 (Oct. 2, 1995). For the practice of national courts, see *Eichmann*, 36 I.L.R. at 303-04; *Demjanjuk*, 776 F.2d at 582-583, and *Prosecutor v. Jorgic*, Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Dec. 12, 2000, 2 BvR 1290/99, ¶¶ 15-17 (Germany).

[12] Universal jurisdiction is compulsory under international humanitarian law for grave breaches. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 75 U.N.T.S. 287.

[13] Crimes against humanity were recognized in Article 6(2)(c) of the Nuremberg Charter of the Military

Nuremberg trials, gross violations of the integrity and dignity of individuals have gradually evolved into issues of universal concern. The content of these norms has been specified both by abundant international treaty practice and by pronouncements of national and international judges on these violations. They can be interpreted as specific, universal, and obligatory international law norms in accordance with this Court's judgment in *Sosa*. 542 U.S. at 732 (citing *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

This trend toward universal jurisdiction corresponds to doctrinal developments in the area of state responsibility. As was famously held in the *Barcelona Traction* case, a number of fundamental rules protecting the "basic rights of the human person" create obligations by each state to all other states, so called *erga omnes* obligations. *Barcelona Traction, Light and Power Co. (Belg. v. Sp.)*, Judgment, 1970 ICJ Rep. 3, ¶ 34. Today it is practically undisputed that each state, even if it is not affected by a breach of such an obligation, has a right to invoke the responsibility of another state for heinous human rights violations. *See* Int'l Law

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Tribunal, August 8, 1945, 8 U.N.T.S. 279. They encompass murder, extermination, enslavement, deportation, and other inhumane acts. This category of violations is today a norm of international customary law, which is recognized as giving rise to universal jurisdiction. *See* Restatement (Third) of Foreign Relations Law §701 & reporters' note 3; §702 cmt. o.

Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, G.A. Res. 56/83, Annex, U.N. Doc. A/RES/56/83 (Dec. 12, 2001).

In state practice, universal jurisdiction so far has only been applied to vindicate gross violations of human rights. *See* Restatement (Third) of Foreign Relations Law § 702 cmt. m.

In sum, in order to be consistent with international law, judges exercising jurisdiction under the ATS based on the universality principle alone can adjudicate gross violations of well-established international human rights norms such as the prohibition of genocide and slavery. Whenever a case implicates any other recognized basis for jurisdiction as outlined above, any violation of the law of nations satisfying the further criteria developed by this Court in *Sosa*, 542 U.S. at 732, could be vindicated by U.S. courts.

### D. The ATS Can Be Interpreted in Light of the Principle Of Universal Jurisdiction Regardless of Its Civil Law Nature

Universal jurisdiction is exercised through criminal and civil law. Restatement (Third) on Foreign Relations Law § 404 cmt. b; Shaw, *supra*, at 652 (recognizing the rarity of diplomatic protests in civil matters). Even though universal criminal jurisdiction is more common than universal civil

jurisdiction, the latter is fully in line with the principles underlying the concept of universal jurisdiction. Notably, the general propriety of the ATS has gone undisputed in these proceedings. As *amicus curiae* briefs in this case demonstrate, even states that support Respondents have not claimed that the ATS in itself necessarily violates the law of nations. What these states seek is a more "cautious" approach in applying the ATS, not the removal of the statute from the books.[14] Indeed, a great majority of states supports sanctioning the most heinous violations of international law through national courts.

Furthermore, there is a general trend toward convergence between criminal and civil remedies in many national legal orders. German law as well as a number of other European legal systems provide for the possibility of civil (i.e. tort-based) compensation in connection with criminal proceedings.[15] The

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[14] *See, e.g.*, Brief of the Federal Republic of Germany as *Amicus Curiae* in Support of Respondents at 15, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Feb. 2, 2012).

[15] *See, e.g.*, Germany, Austria, Belgium, Denmark, France, Luxembourg, the Netherlands, Portugal, and Sweden have such provisions. *See* Brief of E.U. Commission as *Amicus Curiae* in Support of Neither Party at 21, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339) (providing an overview of European countries); *see also* Council Regulation 44/2001, art. 5(4), 2000 O.J. (L 12) (regarding jurisdiction and recognition and enforcement of

former strict procedural separation between criminal law and civil law in continental legal orders is increasingly giving way to a merger of criminal sanctions and requests for damages in a single case. Hence, courts exercising universal criminal jurisdiction can often hear ancillary claims for damages. Lastly, from an international law perspective, no general exclusion of universal civil jurisdiction can plausibly be argued. As this Court recognized in *Sosa*, "modern international law is very much concerned with just such questions, and apt to stimulate calls for vindicating private right in §1350 cases." 542 U.S. at 727.

The principle of universal jurisdiction exists so that nations can provide an effective legal remedy for egregious human rights violations; it does so without specifying domestic procedural requirements. In this regard, punishment and compensation are complementary reactions to illegal conduct. It follows precisely from the idea of decentralized adjudication and enforcement that the choice of procedure remains within the sovereign discretion of each state. One also should note that civil compensation is generally less intrusive for the defendant than criminal sanction. Given that universal criminal jurisdiction is generally accepted in situations of gross violations of certain well-defined human rights norms, universal civil jurisdiction in these cases can

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judgments in civil and commercial matters).

*a fortiori* be recognized as a legitimate concretization of the same general principle.

## II. THE PRUDENTIAL DOCTRINE OF INTERNATIONAL COMITY DOES NOT PRECLUDE THE EXERCISE OF JURISDICTION BASED UPON THE ATS

### A. The Nature of International Comity

International comity signifies traditions or habits of politeness, convenience, and goodwill. Lacking *opinio juris*, this comity of nations is neither a source of international law nor legally binding. *See North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, ¶ 77(Feb. 20); Wolfgang Graf Vitzthum, *Völkerrecht* 29 (5th ed. 2010); *Oppenheim's International Law* 51 (Robert Jennings & Arthur Watts eds., 9th ed. 2011) (calling the difference between rules of international law and international comity "clear-cut in logic"). The distinction between international law proper and considerations of courtesy, deference, or expediency in interstate relations is venerable and firmly established. *Cf.* Hugo Grotius, *De iure belli ac pacis libri tres*, *in* 2 *The Classics of International Law* ¶ 41(James Scott ed., 1964); *The Geneva Arbitration (United States v. Great Britain)*, Decision and Award

(September 14, 1872), *reprinted in* Thomas Balch, *The Alabama Arbitration* 136 (1969). From the perspective of international law, a contravention of international comity can amount, at most, to an unfriendly political act. It cannot give rise to state liability. Accordingly, even if the ATS were in disregard of international comity, which is questionable, it would not be in breach of international law.

Moreover, international comity is a "doctrine more easily invoked than defined." *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 298 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part). This Court has recently described comity as "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states," *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 544 n.27 (1987), and as a concept that leads "each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement." *Sosa*, 542 U.S. at 761 (Breyer, J., concurring). The application of comity is meant to "ensure that 'the potentially conflicting laws of different nations' will 'work together in harmony.'" *Id.* at 761 (quoting *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004)).

As already noted above, deference to the interests of other nations, however, is "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). Rather, it is normally a matter of discretion for the court. *See Bigio v. Coca-Cola Co.*, 448 F.3d 176, 178 (2d Cir. 2006); *Int'l Transactions, Ltd. v. Embotelladora Agral Regiomontana*, 347 F.3d 589, 593 (5th Cir. 2003); *Remington Rand Corp. v. Business Sys., Inc.*, 830 F.2d 1260, 1266 (3d Cir. 1987). However, as is the case with any doctrine that results in a denial of jurisdiction on prudential grounds, it is a discretion that may be employed lightly, since there exists a "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Water Conser. Dist. v. United States*, 424 U.S. 800, 817 (1976).

The circumstances under which a federal court may exercise its discretion and deny jurisdiction based upon international comity are far from clear. *See* Donald Earl Childress, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. Davis L. Rev. 11, 48 (2010). In instances where the extraterritoriality of a federal statute is at issue, the only question is whether a true conflict exists between foreign and domestic law. *See Hartford Fire Insur. v. California*, 509 U.S. 764, 798 (1993). In applying this standard (or choosing not to), the circuit courts are not of one

mind. Both the Ninth and Third Circuits apply the "true conflict" test in virtually all comity cases. *See Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1211-12 (9th Cir. 2007); *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 393 (3d Cir. 2006). The Eleventh Circuit distinguishes between two different forms of the comity doctrine (retrospective and prospective), both concerned with "foreign governments' interests, fair procedures, and American public policy." *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004). The Second Circuit likewise differentiates between two separate categories. In *Hartford*-type cases involving the extraterritoriality of a federal statute, the Second Circuit applies the "true conflict" test. *In re Maxwell Communication Corp. PLC*, 93 F.3d 1036, 1049 (2d Cir. 1996). However, where the decision concerns whether or not a legal action would be more "properly adjudicated in a foreign state", *id.* at 1047, the Second Circuit chooses to focus on whether the exercise of federal jurisdiction would offend the "amicable working relationship" with that foreign state. *Bigio*, 448 F.3d at 178.

### B. Regardless of the Test Employed by This Court, ATS Claims Will Rarely Merit Dismissal Based Upon Concerns of International Comity

It is questionable whether any of the tests would require the dismissal of an ATS action. The class of international norms actionable under the ATS has been described as "narrow" by this Court. *Sosa*, 542 U.S. at 729. In *Sosa*, this Court cited with approval the contention that the reach of the ATS extended only so far as to cover a "handful of heinous actions—each of which violates definable, universal and obligatory norms". *Id.* at 732 (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring)). These obligatory norms of international law protecting human dignity are universally recognized, and as such all nations have a community interest in their enforcement. For instance, the Federal Republic of Germany in its *amicus* brief expressly holds itself out as a "strong defender" and promoter of human rights, while not submitting any actual, concrete comity concerns beyond a very general suggestion that the ATS "could potentially interfere" with Germany's sovereignty—and even then only if the statute is applied in an "unreasonable" manner. Brief of the Federal Republic of Germany as *Amicus Curiae* in Support of Respondents at 1, 10, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Feb. 2, 2012). Moreover, jurisdiction and sovereignty are not coextensive.

The "heinous" nature of the actions within the province of the ATS dictate that very few, if any,

legitimate ATS cases will merit dismissal under any of the specific comity standards employed in the circuit courts. For example, the "true conflict" test developed in *Hartford Fire* states that international comity is only appropriate where a "true conflict" exists between the American and foreign law, and that no such conflict exists where the person subject to both laws is able to comply with both simultaneously. 509 U.S. at 798-99. Given that any meritorious cause of action brought under the ATS will involve actions that are based on norms that are both universal and obligatory, and thus necessarily illegal in every nation, it is unlikely that there could exist such a "true conflict" that would make a dismissal based upon comity appropriate.

Furthermore, any legitimate ATS case also will satisfy the Second Circuit's "amicable working relationship" test, which is mainly concerned with not offending foreign relations with a particular foreign nation. The obligatory and universal nature of the international norms at issue here dictate that all foreign nations necessarily have aligned interests in their enforcement, and the exercise of jurisdiction by the federal courts "will not significantly threaten the practical harmony that comity principles seek to protect." *Sosa*, 542 U.S. at 762 (Breyer, J., concurring).

Similarly, the applicable international comity test arising from Eleventh Circuit jurisprudence also

will rarely, if ever, require the dismissal of an ATS action. Retrospective application involves cases where either parallel foreign proceedings or a foreign court judgment already exists, neither of which is true in the present case. *Ungaro-Benages*, 379 F.3d at 1238. The prospective comity doctrine concerns "whether to dismiss or stay a domestic action based on the interests of our government, the foreign government and the international community in resolving the dispute in a foreign forum." *Id.* at 1238. That the jurisdiction of the foreign nation has not been invoked in a case involving universally recognized human rights claims is the conscious choice of the individual filing the ATS claim. Such individual choice is legally permissible and is deserving of some deference itself.[16] After all, courts all over the world tend to assume jurisdiction where national procedural codes see fit, as long as they consider their jurisdiction reasonable and based on sufficient connections to their forum according to their municipal law.

Moreover, the mere application of the Eleventh Circuit test itself is not without difficulties.

[16] In ordinary transnational litigation among businesses or individuals based or residing in different countries, it is commonplace and perfectly legitimate that a civil claim is brought in a forum where the plaintiffs can expect the most favorable adjudication of their claim or where the defendant has sufficient assets so that the effective enforcement of the judgment can be ensured.

Establishing whether the interests of a foreign nation deserve deference from the federal judicial branch requires U.S. courts to not only evaluate, but also determine the legitimacy and relative importance of these foreign interests vis-a-vis U.S. interests . This is an evaluation that is fraught with potential diplomatic landmines. The entire process of evaluating and weighing the interests of foreign nations in the name of international cooperation and harmony appears as likely to upset that harmony as ensure it.

### C. Even Where Concerns Over International Comity Suggest Deference to Foreign Nation, Consideration of American Public Policy Will Likely Necessitate the Retention of Jurisdiction Over an ATS Claim

Nevertheless, exceptional circumstances occasionally do exist where the interests of a foreign nation are of such importance that the exercise of jurisdiction over a particular ATS case will potentially provoke disharmony between the United States and that foreign nation. In such a case, it is likely that the United States Department of State will inform the court of its concerns in this respect. These concerns, while entitled to great respect,

however, are not dispositive.[17] *See Khulumani* 504 F.3d at 263-64. Yet, even in these circumstances, it is not entirely clear that a dismissal of an ATS claim under the international comity doctrine would be appropriate.

"No nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum." *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984). Federal courts will not defer to foreign interests where "doing so would be contrary to the policies or prejudicial to the interests of the United States." *Pravin Banker Associates, Ltd. v. Banco Popular Del Peru*, 109 F.3d 850, 854 (2d Cir. 1997). Given the particularly heinous character of the actions justiciable under the ATS and their status as universal and obligatory norms of international law, it is likely that choosing not to enforce those international norms would be against the public policy of the United States. Torture, for instance, is itself against the stated public policy of the United States. *See, e.g.*, S. Rep. No. 249, at 3 (1991) (Senate Report for Torture Victim Protection Act noting that "no state commits

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[17] Naturally, in exercising jurisdiction over a case that impacts the foreign relations of the United States, questions concerning the proper separation of powers between the executive and judicial branches will arise. As these issues do not bear upon international law or comity, they are not dealt with in this brief.

torture as a matter of public policy"). It follows that voluntarily not enforcing the international norm against torture where the exercise of jurisdiction over that norm is both possible and an "unflagging obligation" of the federal courts would also be against domestic public policy. Considering that the ATS will largely involve instances of gross violations of human rights, this is arguably the case with nearly every claim brought under that statute. In such circumstances, the interests of international comity, regardless of their strength, must take a backseat to domestic public policy interests. *Pravin Banker Associates, Ltd.*, 109 F.3d at 854.

## III. ANY REQUIREMENT UNDER INTERNATIONAL LAW TO EXHAUST LOCAL REMEDIES DOES NOT CATEGORICALLY PRECLUDE A CLAIM UNDER THE ATS

This Court has indicated that it might consider an exhaustion requirement akin to that of the Torture Victim Protection Act, Pub. L. 102-256, 106 Stat. 73 (1991) ("TVPA") in an "appropriate case". *Sosa*, 542 U.S. at 733 n.21, thus indicating that there are cases where the exhaustion of local remedies would be inappropriate. An ATS suit is generally not a situation in which the exhaustion rule of international law is appropriate.

### A. The Exhaustion Rule Applies to Diplomatic Protection under International Law

Historically, the international law principle concerning the exhaustion of local remedies is rooted in the practice of sovereigns protecting their subjects when they are injured abroad.[18] Exhaustion was originally conceived as a precondition for requesting one's own prince to espouse a claim against a foreign state on one's behalf. This would be accomplished through the mechanism of diplomatic protection, whereby the home state of an injured person takes up his or her case and obtains reparation for an internationally wrongful act committed by a foreign state through diplomatic action or other peaceful means of dispute resolution.[19] As encapsulated by the International Court of Justice, the underlying rationale of the exhaustion requirement is that "the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic system". *Interhandel* (Switz. v. U.S.), 1959 I.C.J. 6, 27 (Mar. 21) (Preliminary Objections).

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[18] *See* J. Crawford and T. Grant, *Local Remedies, Exhaustion of*, in *Max Planck Encyclopedia of Public International Law* (R. Wolfrum, ed.), ¶¶ 1, 42 (2012).

[19] *Cf.* Int'l Law Commission, *Draft Articles on Diplomatic Protection* arts. 1, 14 U.N. GAOR, 61st Sess., Supp. No. 10, U.N. Doc. A/61/10 (2006).

Private tort claims, such as those brought under the ATS, do not involve diplomatic protection because tort plaintiffs are not asking their sovereign to present a claim against another state on their own behalf in respect of an injury suffered. The present case illustrates the point. Claimants are seeking redress against violations allegedly committed by a corporation in complicity with their own state. The fiction that their ill-treatment injures their home state,[20] which is the rationale for traditional diplomatic protection, makes little sense when residents of Nigeria claim that various corporations aided and abetted the Nigerian government in committing violations of the law of nations. Nor can they be taken to have willingly accepted foreign mechanisms upon going abroad, which is another justification for the exhaustion rule. *Salem* (U.S. v. Egypt) 2 R. Int'l Arb. Awards 1161, 1202 (U.S.-Egypt Special Claims Tribunal 1932). There is no "sending" or "receiving" state in a typical ATS suit and hence no tacit submission.

## B. The Exhaustion Rule Is a Procedural

[20] The Permanent Court of International Justice put it as follows: "by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure, in the person of its subjects, respect for the rules of international law". *Mavrommatis Palestine Concessions* (Greece v. U.K.) 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30).

### Requirement for Individual Claims before International Human Rights Bodies, but Not a Procedural Requirement for ATS Claims Before a Domestic Court

Beyond diplomatic protection, exhaustion of local remedies plays a role when private individuals bring proceedings in their own right against states on the international plane, in particular based on international conventions for the protection of human rights. Under the International Covenant on Civil and Political Rights, for example, the Human Rights Committee may accept individual communications claiming that a State party has violated the treaty only by exhausting all available domestic remedies, as long as they are not unreasonably prolonged. Optional Protocol to the International Covenant on Civil and Political Rights arts. 2, 5(2)(b), Dec. 16, 1966, 99 U.N.T.S. 171. Similarly, the European Convention on Human Rights states in its admissibility criteria that the European Court of Human Rights may only adjudicate "after all domestic remedies have been exhausted, according to the generally recognised rules of international law . . . ." Convention for the Protection of Human Rights and Fundamental Freedoms art. 35(1), Nov. 4, 1950, 213 U.N.T.S.

221.[21] Crucially, these regimes envisage that exhaustion of local remedies contributes to the effective vindication of human rights claims, rather than being a mechanistic barrier thereto.[22] The ultimate point is actual redress. For the same reason, those regimes only require exhaustion of effective domestic remedies. *See infra* Part III.D.

In such situations, the exhaustion of local remedies features as a prerequisite for the admissibility of non-domestic claims in international courts and tribunals. In the classic formulation of the Commission of Arbitration: "[The rule] means that the State against which an *international action* is brought for injuries suffered by private individuals has the right to resist such an action if the persons alleged to have been injured have not first exhausted all the remedies available to them under the municipal law of that State." *Ambatielos* (Greece v. U.K.) 12 R. Int'l Arb. Awards 83, 118-119 (1956) (emphasis added). In short, the rule serves to demarcate the line between the jurisdiction of international and national courts.[23]

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[21] *See also* American Convention on Human Rights art. 46(1)(a), Nov. 22, 1969, 1144 U.N.T.S. 123.

[22] *See* A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* 4 (1983).

[23] *See* D. Mummery, *The Content of the Duty to Exhaust Local Judicial Remedies*, 58 Am. J. Int'l L. 389, 390

It is important to note in this respect that in its codification efforts on state responsibility, the International Law Commission (ILC) has explicitly rejected the notion of exhaustion as a substantive element of a breach of an international obligation. In Article 44(b) of the final version of the ILC's Draft Articles on the Responsibility of States for Internationally Wrongful Acts, which were approved by the UN General Assembly, exhaustion is expressly treated as a matter of admissibility.[24] This procedural approach fits with the jurisprudence of the International Court of Justice, which stated that "for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success." *Elettronica Sicula SpA (ELSI)* (U.S. v. Italy), 1989 I.C.J. 15 (July 20). See also *Interhandel*, 1959 I.C.J. at 26-27; *Factory at Chorzów* (Germany v. Pol.), 1927 P.C.I.J. (ser. A) No. 9, at 26 (July 26).

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(1964).

[24] The first reading of the draft articles of 1996, ultimately rejected, had instead insisted in that "there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them . . . ." Int'l Law Commission (Forty-eighth Session), U.N. GAOR, 51st Sess. at 125-151, Supp. No. 10, U.N. Doc. A/51/10 & Corr.1. (1996).

A civil suit under the ATS is a domestic action before a domestic court. That the alleged conduct violating a substantive norm of international law took place abroad is immaterial in this respect. A U.S. torts claim brought by individuals in a U.S. court against private entities is not one to which the international law rule on exhausting local remedies applies. Of course, the domestic legal system of the U.S. might otherwise impose limiting elements on ATS claims. But it is neither required by international law, nor desirable in principle, for this Court to evaluate the municipal law and procedure of other states in order to determine whether plaintiffs in a situation such as the present have exhausted available local remedies. For good reason, §1350 itself does not contain a requirement for U.S. courts to evaluate the capability of foreign courts.

### C. The Scope of the Rule is Limited to Local Remedies

Even if the international law principle on the exhaustion of remedies were considered applicable in an ATS suit, the scope of the rule would be limited to *local* remedies, i.e. domestic remedies of the state in which the conduct giving rise to the claim occurred. By analogy, the TVPA fittingly speaks of claimants exhausting "adequate and available remedies *in the place in which the conduct giving rise to the claim occurred*" (emphasis added). Pub. L. 102-256 §2(b).

Such an interpretation is in accordance with the leading international law cases. The tribunal in *Ambatielos*, 12 R. Int'l Arb. Awards at 119, spoke of private individuals having recourse to "all the remedies available to them under the municipal law of that State [i.e the state against which an international action is brought]". Likewise, *Interhandel*, 1959 I.C.J. at 27, ruled that "the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic system". Moreover, it is established case law of the European Court of Human Rights that the exhaustion of domestic remedies demands that the national legal remedies of the respondent state are used. *Akdivar v. Turkey*, 23 Eur. Ct. H.R. 143, 182 (1996).

This clearly defined scope makes sense in light of the basic rationale of the requirement: the host state, i.e. the sovereign within whose territory the alleged violation takes place, should have a proper opportunity to settle the dispute through its own legal system. *See, e.g., Davydov v. Ukraine*, Judgment at ¶ 247 (Eur. Ct. H.R. July 1, 2010), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=870753&portal=hbkm&source=externalbydocnumber&tabl. This harks back to the basic rationale behind the exhaustion rule: to give local courts the opportunity to decide a case prior to an international forum. It assumes a binary contest.

The rule does not, even if applied analogously, solve cases of concurrent national jurisdiction. It cannot, for instance, coordinate between the location in which an act occurred, where the harm manifested, or where the respondent was domiciled, registered or headquartered.

### D. Exceptions To The Exhaustion Rule Exist

In any event, it is well-established that such recourse is excused in certain cases. Art. 15 of the International Law Commission's *Draft Articles on Diplomatic Protection* succinctly summarizes the pertinent international law. The exhaustion requirement does not apply whenever local remedies are neither reasonably available nor capable of providing effective redress. The aggrieved individual must not be manifestly precluded from pursuing local remedies. Undue delay constitutes another exception. That the requirement is not immutable is further borne out by the fact that states against which an international action is brought can waive it. U.N. Doc. A/61/10 (2006). This practice is, for example, abundantly common in bilateral investment treaties, including those of the U.S., which among other things afford private investors from each treaty party the right to submit an investment dispute with the host state to

international arbitration without having to use local courts.[25]

In short, the remedy must not just exist on paper. While it is generally asked that the essence of a case was brought and unsuccessfully pursued as far as permitted by local law, *e.g.*, ***ELSI***, 1989 I.C.J. at 15, there must at least be a "reasonable possibility" of redress. *Certain Norwegian Loans (Fr. v. Nor.)* 1957 I.C.J. 9, 39 (Separate Opinion of Lauterpacht, J.); *Draft Articles on Diplomatic Protection* (2006) art. 15(a). It must further not be unfair or unreasonable to require that an injured alien should be required to exhaust local remedies. As noted by a NAFTA tribunal, what is demanded is that remedies are effective, adequate and reasonably available. *The Loewen Group, Inc. v. United States of America*, ICSID Case No. ARB(AF)/98/3, June 26, 2003, 7 ICSID (W. Bank) 442, ¶165 (2003). Whether or not this is the case can be presumed from the actual circumstances.

Local proceedings are not, for example, required when the domestic courts have no jurisdiction over the complaint or when host state legislation will not be reviewed by the domestic courts. Moreover, where there is evidence that the independence of the judiciary is doubtful in light of the capricious

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[25] *See, e.g.*, Treaty Concerning the Encouragement and Reciprocal Protection of Investment , U.S.-Rwanda, arts. 24-25, Feb. 19, 2008, S. Treaty Doc. No. 110-23 (2008).

authority of the executive, there is simply no justice to exhaust. *Robert E. Brown* (U.S. v. U.K.), 6 R. Int'l Arb. Awards 120, 129 (Gr. Brit.-U.S. Arb. Trib. 1923); *see also Mushikiwabo v. Barayagwiza*, No. 94 Civ. 3627, 1996 U.S. Dist. LEXIS 4409, at *5 (S.D.N.Y. Apr. 9, 1996) (plaintiffs fulfilled the exhaustion requirement of the TVPA by showing that the Rwandan judicial system was virtually inoperative and unable to deal with civil claims in the near future).

Less drastic but no less significant, exhaustion is no bar when local proceedings would be ineffective. It has been contended in the present proceedings that states other than Nigeria, in particular the states in which the respondent transnational corporations are headquartered or have their registered office, provide adequate access to their own courts and to appropriate legal remedies for non-European nationals who have been victims of serious human rights violations abroad. However, the general rule under the harmonized European conflict of laws provides that the law applicable to a non-contractual obligation arising out of a tort or delict is the law of the country in which the damage occurs, which is most likely the injured party's country of residence. *See* Council Regulation 864/2007, on the law applicable to non-contractual obligations ("Rome II"), art. 4(1) 2007 O.J. (L 199) 40, 44. As the European Commission stated in its preparatory memorandum, this basic rule is a

codification of prominent member states' conflict rules, including—but not limited to—the solutions previously applied in the Netherlands, the United Kingdom, France, and Switzerland. *Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("Rome II")*, at 11, COM (2003) 427 final (July 22, 2003). It also mirrors the basic principle of the harmonized European jurisdiction regime, thus reflecting general European practice. This may very well engender the problems outlined above concerning effective redress. Moreover, a recent study published by the European Commission seriously questioned the ready and practical availability of effective legal remedies within the E.U. in a situation like the present in more general terms and proposed to reform E.U. legislation in that respect. Daniel Augenstein, Univ. of Edinburgh, *Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union*, at 76 (Oct. 2010) (report commissioned and published by European Commission); *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, at ¶¶ 109-112, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010).

In conclusion, even if applicable, any requirement under international law to exhaust local

remedies does not categorically preclude a claim under the ATS.

## CONCLUSION

For the foregoing reasons, application of the Alien Tort Statute in cases involving torts in violation of the law of nations is consistent with international law. The Court should therefore reverse the decision of the United States Court of Appeals for the Second Circuit and uphold jurisdiction in this case.

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Respectfully submitted,

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## APPENDIX - LIST OF *AMICI CURIAE* GERMAN INTERNATIONAL LAW SCHOLARS

The **German Institute for Human Rights** has co-operated with the following Law Clinic and individuals as authors of the brief:

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The **Humboldt Law Clinic for Human Rights** (*Grund- und Menschenrechte*) was established in October 2010 and is the first human rights law clinic in Germany. The Clinic works together with students and partner civil society organisations on a range of human rights matters before domestic and international courts, focusing on human rights issues related to Germany, and anti-discrimination law. The Clinic is part of the Humboldt University Faculty of Law and operates under the Chair of Public Law and Gender Studies of Sarah Elsuni.